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No. _____

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1987

MICHAEL DUTTON, Warden,

Petitioner,

v.

WILLIAM LYNN JOHNSON,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals granted the writ of habeas corpus on a claim upon which state remedies had not been exhausted, contrary to 28 U.S.C. § 2254(b) and applicable decisions of this Court.

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OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Sixth Circuit was filed on June 1, 1987, and is attached as Appendix A.

The unpublished order of the United States Court of Appeals for the Sixth Circuit denying a petition for a rehearing was filed on July 7, 1987, and is attached as Appendix B.

The unpublished order of the United States District Court for the Western District of Tennessee granting the writ of habeas corpus was filed on June 13, 1986, and is attached as Appendix C.

The unpublished opinion of the Court of Criminal Appeals of Tennessee on the direct appeal of the respondent's conviction was filed on May 15, 1980, and is attached as Appendix D.

The unpublished order of the Supreme Court of Tennessee on the respondent's direct appeal was filed on July 28, 1980, and is attached as Appendix E.

The unpublished opinion of the Court of Criminal Appeals of Tennessee on the respondent's post-conviction appeal was filed on December 29, 1983, and is attached as Appendix F.

The unpublished order of the Supreme Court of Tennessee on the respondent's post-conviction appeal was filed on March 5, 1984, and is attached as Appendix G.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the Court of Appeals for the Sixth Circuit was filed on June 1, 1987. The Court denied a petition for a rehearing on July 7, 1987. This petition was filed within sixty days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const: amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

U.S. Const. amend. XIV, § 1:

> No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law; . . . .

28 U.S.C. § 2254(b):

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

28 U.S.C. § 2254(c):

> An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

Tenn. Code Ann. § 40-30-102:

> A prisoner in custody under sentence of a court of this state must petition for post-conviction relief under this chapter within three (3) years of the date of the final action of the highest state appellate court to which an appeal is taken or consideration of such petition shall be barred.

Tenn. Code Ann. § 40-30-112:

> (a) A ground for relief is "previously determined" if a court of competent jurisdiction has ruled on the merits after a full and fair hearing.
>
> (b)(1) A ground for relief is "waived" if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented.
>
> (2) There is a rebuttable presumption that a ground for relief not raised in any such proceeding which was held was waived.

———o———

STATEMENT OF THE CASE

William Lynn Johnson was convicted in a May, 1979, jury trial of murder in the second degree by use of a firearm and carrying a pistol with the intent to go armed. He was sentenced to life imprisonment for the murder, plus a consecutive five (5) years for use of a firearm in the commission of the murder, and was fined one thousand dollars ($1,000) for carrying a pistol. Prior to trial Mr. Johnson had exhibited no signs of irrational behavior to his attorney and neither he nor his family had advised his attorney of any previous mental problems. However, at the end of the first day of trial, when he was advised that he would be held in custody for the duration of the trial, Mr. Johnson began crying and trembling. On the second day of trial, in a chance meeting with a former attorney of Mr. Johnson, defense counsel first learned of his client's earlier history of treatment for mental illness. On the prompt

motion of defense counsel, the trial was recessed and Mr. Johnson was given a psychiatric examination. He was found to be competent and the trial was resumed. Defense counsel then attempted to call two (2) witnesses to testify before the jury as to his client's past mental illness. However, the trial judge refused to allow the evidence due to the lack of pre-trial notice to the State that an insanity defense would be presented. An offer of proof outside the presence of the jury was made of Mr. Johnson's medical records. These records included a July 29, 1976, court judgment finding Mr. Johnson to be "mentally ill" and committing him to a mental hospital. The records showed that Mr. Johnson was admitted on July 29, 1976, and was discharged in "improved condition" on August 6, 1976. Although the records indicated that Mr. Johnson's prognosis was "very poor", he was discharged "competent." There were no records showing any further treatment.

On the direct appeal of the conviction, defense counsel alleged, *inter alia,* that the trial court erred in refusing to allow the defense to fully develop his client's mental condition in the jury's presence. A three-judge panel of the Court of Criminal Appeals rejected the contention, finding that the trial court properly refused the untimely proof, and unanimously affirmed the conviction. *See* Appendix D. The Supreme Court of Tennessee denied permission to appeal. *See* Appendix E.

Mr. Johnson next filed a *pro se* petition for post-conviction relief in the trial court alleging that he did not have the effective assistance of counsel at trial because, *inter alia,* his attorney "deprived [him] of a substantial insanity defense" by failing to investigate the fact that he was of unsound mind and failed to present the insanity defense

at the proper time. In a subsequent amendment to the petition, Mr. Johnson claimed that his attorney "did not confer with his client in the manner required of an attorney in a criminal case, spending less than four (4) hours in total with [Johnson] before trial" and "wholly failed to discuss with [Johnson] possible trial strategies including motions to file and what manner to conduct cross-examination". Counsel was appointed to represent Mr. Johnson in the post-conviction proceedings and an evidentiary hearing was conducted. The trial court denied post-conviction relief and made the following findings:

> From the entire record in this case, the Court finds that the attorney for the defendant was not made aware of the defendant's mental condition until the trial had begun. That the defendant, or his family, never informed the defense attorney of any prior mental condition, and it was not called to his attention until an attorney who had previously represented the defendant on other charges informed him about the situation after the trial had begun, and then the Defense attorney called it to the Court's attention, and the Court called a doctor in to examine the defendant.
>
> The Court further finds that the attorney for the defendant had adequately prepared his case. He had been in contact with the State to get a guilty plea offer, received complete discovery from the State, and had properly cross-examined the State's witnesses and presented his own proof.

On appeal from the judgment denying post-conviction relief, counsel for Mr. Johnson raised a single issue: "Whether the appellant was denied effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution by the failure of his trial attorney to raise the defense of insanity at the proper time and in

the proper manner at trial." While counsel noted, in the argument section of his brief, that trial counsel "had no in-depth pretrial discussion with defendant Johnson", he did not raise this as a claim. The clear thrust of the appeal was the complaint that trial counsel had failed to raise the defense of insanity in a timely and proper manner. No separate claim that counsel failed to explore with his client any defenses of any kind was made. A three-judge panel of the Court of Criminal Appeals of Tennessee unanimously affirmed the judgment denying post-conviction relief. *See* Appendix F.

After the withdrawal of appellate counsel, Mr. Johnson filed a *pro se* application for permission to appeal with the Supreme Court of Tennessee. He again complained that he had received ineffective assistance of counsel at his original trial because, *inter alia,* his attorney "failed and deprived petitioner of a substantial insanity defense", "failed to present the insanity defense at the proper time during the Criminal Procedure", and "failed to communicate with his client on the progress and disposition of the case." Mr. Johnson did not complain that his counsel had failed to explore with him any defenses of any kind. The Supreme Court of Tennessee denied permission to appeal. *See* Appendix G.

Mr. Johnson next filed in the district court a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, and subsequently an amendment to the petition, deleting many of his ineffective assistance of counsel claims. He retained the complaint that counsel "failed and deprived petitioner of a substantial insanity defense. However, Mr. Johnson did not aver that counsel had failed to explore with him any defenses of any kind. The district court framed

the issue as whether trial counsel "was negligent in not investigating and discovering Johnson's past mental illness and whether that negligence deprived Johnson of a substantial defense that may have, if properly advanced changed the outcome of the trial." After reviewing the state court records and conducting an independent evidentiary hearing, the district court answered the proposition affirmatively and granted habeas corpus relief. *See* Appendix C.

The respondent appealed the judgment of the district court to the Court of Appeals. The Court affirmed, not on the narrow ground framed by the district court, but on the ground that counsel "failed to explore with his client any defenses of any kind." *See* Appendix A. The respondent's petition for a rehearing was denied. *See* Appendix B.

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REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

THE COURT OF APPEALS' DECISION CONFLICTS WITH 28 U.S.C. § 2254(b) AND APPLICABLE DECISIONS OF THIS COURT.

Section 2254(b), United States Code, provides:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

This Court has repeatedly held that in order to exhaust state remedies, a prisoner must present the state courts

with the same factual and legal claims that he urges upon the federal courts. *Anderson v. Harless,* 459 U.S. 4, 6 (1982); *Picard v. Connor,* 404 U.S. 270, 274-275 (1971). It is not enough that the federal questions may have been presented to the state trial court; they must have been raised before the state's highest court. *Reid v. Jones,* 187 U.S. 153, 154 (1902).

In this case, the Court of Appeals concluded that trial counsel's "failure to consult with Johnson in the preparation of his defense" amounted to ineffective assistance of counsel. However, this claim, while presented to the state trial court at his post-conviction proceeding, has never been fairly presented to the state appellate courts.[1] The Court of Appeals did not find, nor does the record show, that there was either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.[2]

---

[1]Moreover, the claim was not presented in Johnson's § 2254 petition filed in the district court.

[2]Section 2254(c), United States Code, provides that "[a]n applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented." It may be that the state courts will now refuse to entertain a claim that failure to consult with Johnson in the preparation of his defense amounted to ineffective assistance of counsel. *See* Tenn. Code Ann. § 40-30-112(b) (waiver for knowingly and understandingly failing to present claim) and § 40-30-102 (three-year statute of limitations for post-conviction petitions). However, whether Mr. Johnson is entitled to present his unexhausted claim to the state appellate courts is a matter for the determination of the state courts, not the federal courts. *See Parker v. Rose,* 728 F.2d 392, 394-395 (6th Cir. 1984); *Wilson v. Fogg,* 571 F.2d 91, 94-95 (2d Cir. 1978).

The petitioner is aware that this Court does not sit as a court of error in federal habeas corpus proceedings. However, the Court of Appeals, in failing to apply the plain mandate of § 2254(b), has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Moreover, the Court of Appeals has rendered a decision in conflict with the applicable decisions of this Court.

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CONCLUSION

For the reasons stated, the petitioner urges the Court to grant a writ of certiorari.

Respectfully submitted,

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APPENDIX

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Appendix B—Order of the United States Court of Appeals for the Sixth Circuit (Filed July 7, 1987)

Appendix C—Order of the United States District Court for the Western District of Tennessee (Filed June 13, 1986)

Appendix D—Opinion of the Court of Criminal Appeals of Tennessee (Filed May 15, 1980)

Appendix E—Order of the Supreme Court of Tennessee (Filed July 28, 1980)

Appendix F—Opinion of the Court of Criminal Appeals of Tennessee (Filed December 29, 1983)

Appendix G—Order of the Supreme Court of Tennessee (Filed March 5, 1984)

APPENDIX A

No. 86-5760

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM LYNN JOHNSON,

Petitioner-Appellee,

v.

MICHAEL DUTTON, WARDEN,

Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE.

———————/

Decided and Filed June 1, 1987

BEFORE: KENNEDY, RYAN, and NORRIS, Circuit Judges.

PER CURIAM. Respondent appeals the order of the district court granting to petitioner, William Johnson, a writ of habeas corpus, conditioned upon the state of Tennessee not granting him a new trial. The basis of petitioner's request for relief was his claim that he was denied the effective assistance of counsel.

The district court believed that the issue raised by the record of proceedings in the state courts was "whether trial counsel representing Johnson was negligent in not investigating and discovering Johnson's past mental illness and whether that negligence deprived Johnson of a substantial defense that may have, if properly advanced, changed the outcome of the trial." The district court answered the proposition in the affirmative.

Although we affirm the order of the district court, we do so not on the narrow ground framed by the district court, that trial counsel was negligent in not discovering Johnson's history of mental problems, as the predicate for a possible plea of not guilty by reason of insanity. On the record before us, trial counsel failed to effectively represent Johnson because he failed to explore with his client any defenses of any kind. That was the main thrust of Johnson's argument in the state proceedings for postconviction relief, and no state court has made a factual finding contrary to Johnson's testimony that counsel never consulted with him about the case prior to trial. Indeed, the evidence before the state courts was uncontroverted that trial counsel failed to ever consult with Johnson in the preparation of his defense.

Although the state courts concluded that trial counsel had been effective in obtaining defense witnesses, and in the conduct of the trial itself, the specific complaint raised by Johnson was not addressed. Because, under the circumstances of this case, failure to consult with Johnson in the preparation of his defense so clearly deprived him of effective representation of counsel, we *affirm* the judgment of the trial court entered on July 2, 1986.

APPENDIX B

No. 86-5760

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed July 7, 1987]

WILLIAM LYNN JOHNSON,	)	
	)	
Petitioner-Appellee,	)	
	)	
vs.	)	ORDER
	)	
MICHAEL DUTTON, WARDEN,	)	
	)	
Respondent-Appellant,	)	

Before: KENNEDY, RYAN and NORRIS, Circuit Judges

Upon consideration of the petition for rehearing filed herein by the respondent-appellant, the court concludes that the issues raised therein were fully considered upon the original oral argument and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is *denied.*

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

/s/ Leonard Green,
Chief Deputy

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

[Filed June 13, 1986]

WLILIAM LYNN JOHNSON,	)	
	)	
Petitioner,	)	
	)	CASE NO.
v.	)	84-2776 H
	)	
MICHAEL DUTTON, Warden,	)	
	)	
Defendant.	)	

ORDER GRANTING PETITION FOR HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254 IF NEW TRIAL IS NOT GRANTED WITHIN 180 DAYS

William Lynn Johnson petitioned this Court for habeas corpus relief pursuant to 28 U.S.C. § 2254. Johnson claims he was denied the effective assistance of counsel during his trial in the Criminal Court of Shelby County, Tennessee, in 1979, on charges of murder in the first degree and carrying a pistol. After a complete review of the entire record, including the record of the proceedings at the state trial court and a hearing conducted by this Court, the Court finds the petition alleges facts, substantiated in the record, which are sufficient to justify the Court granting specific relief in this case.

Background

On January 9, 1979, the Shelby County Grand Jury indicted William Lynn Johnson on charges of murder in

the first degree while employing a firearm, and carrying a pistol. Johnson was arraigned on February 22, 1979. At the arraignment, Johnson was represented by retained counsel. The case was tried by a jury on May 1, 2, 3, 1979. On May 2, 1979, the trial Court ordered a mental evaluation to determine Johnson's competency to stand trial. The jury returned verdicts of: 1) guilty of murder in the second degree, fixing punishment at life imprisonment; 2) guilty of using a firearm in the commission of a felony, fixing punishment at imprisonment for five years; and 3) guilty of carrying a pistol, fixing punishment at a fine of one thousand dollars ($1,000.00).

Counsel moved for a new trial on June 11, 1979. The trial Court overruled the motion for a new trial; ninety days were allowed for Johnson to perfect his appeal.

The evidence adduced at trial shows that Johnson shot and killed a man named Charles Moss with a pistol. The shooting was about money. The evidence is that Johnson gave the decedent, Charles Moss, four hundred dollars to purchase drugs for Johnson. Moss was apparently unsuccessful in his attempts to purchase drugs and thereafter returned two hundred dollars to Johnson, owing a balance of two hundred dollars. On the evening of September 10, 1978, Johnson began searching for Moss in an attempt to collect the remaining two hundred dollars. At approximately 3:15 a.m., Johnson located Moss seated in an automobile with a companion, Denise Williams, in the parking lot of an apartment complex in Memphis, Tennessee. Johnson approached the car and, according to the testimony of Ms. Williams, shot Moss four times with a pistol at close range.

On November 26, 1978, Johnson surrendered to the Shelby County Sheriff's office. At this point, Johnson gave a signed confession to a Sergeant Carpenter concerning the homicide. Johnson alleges in his petition that prior to surrendering to the authorities, and signing the confession, he "shot up on some dope," and further alleges he does not remember surrendering or giving the confession due to the effects of the narcotics, Johnson testified that prior to surrendering to the authorities, he had injected himself with five 75 mg. tablets of preludin or "speed," and that he had consumed four ounces of Robitussin cough syrup which contained codeine. (Trial Transcript, Vol. III, pp. 173-174). The trial Court overruled Johnson's motion to exclude his confession, ruling that Johnson knowingly and understandingly confessed to the crime.

Contentions of the Petitioner, Johnson

Johnson bases his petition for a writ of habeas corpus on the contention he was not afforded the effective assistance of counsel. Johnson claims his attorney failed to properly investigate, discover and raise the defense of mental competency to stand trial.[1/2] It is uncontested that trial counsel for Johnson attempted to offer evidence to the jury on Johnson's past mental illness. (Trial Transcript, Vol. II, pp. 73-84; Vol. III, pp. 302-318). However,

---

[1]The record shows that Johnson was adjudicated *non compos mentis* by the Shelby County Probate Court on July 29, 1976.

[2]The record discloses that Johnson's trial counsel, Mr. Thomas M. Privett, Jr., was suspended from the practice of law by the Tennessee Supreme Court for three years on September 24, 1979. (*In Re Thomas M. Privett, Jr.*, Docket No. 68 Supreme Court of Tennessee, June 26, 1980).

the trial judge declined the admission of such evidence, based on the lack of pre-trial notice to the state of a possible insanity defense. (Trial Transcript, Vol. III, pp. 302-318).

At the post-conviction proceeding, the issue of counsel's failure to investigate and adequately present an insanity defense was raised. On this issue, the trial court ruled:

> From the entire record in this case, the Court finds that the attorney for the defendant was not made aware of the defendant's mental condition until the trial had begun. That the defendant, or his family, never informed the defense attorney of any prior mental condition, and it was not called to his attention until an attorney who had previously represented the defendant on other charges informed him about the situation after the trial had begun, and then the defense attorney called it to the Court's attention, and the Court called a doctor in to examine the defendant.[3]

CONCLUSIONS OF LAW

Exhaustion of Remedies

The Court must first address the issue of petitioner's adherence to the exhaustion of remedies doctrine. As the respondent correctly states, "it is well established that a federal district court must dismiss a habeas corpus petition, filed by a state prisoner, containing any claims that have not been exhausted in state courts." *Rose v. Lundy*, 455 U.S. 509, 510, 102 S. Ct. 1198, 1199, 71 L.Ed. 379 (1982).

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[3]*See, William Lynn Johnson v. State of Tennessee*, Docket No. P-2311 Criminal Court of Shelby County, Tennessee, September 8, 1982.

See also 28 U.S.C. § 2254(b). The total exhaustion rule "furthers the policy of comity . . . because it gives the state courts the first opportunity to correct federal constitutional errors and minimizes federal interference and disruption of state judicial proceedings." *Rose v. Lundy,* 455 U.S. at 514; *see also, Wildwording v. Swenson,* 404 U.S. 249, 92 S. Ct. 407, 30 L.Ed.2d 418 (1971); *Galtieri v. Wainwright,* 582 F.2d 348 (5th Cir. 1978); *Gonzales v. Stone,* 546 F.2d 807 (9th Cir. 1976). Further, the Court notes the total exhaustion rule is to be strictly observed in this circuit and may not in any way be conceded or waived. *Alcorn v. Smith,* 724 F.2d 37, 39 (6th Cir. 1983).

In order to exhaust all possible state remedies, the petitioner must *offer* his claims to the highest state court for consideration. *Brown v. Allen,* 344 U.S. 443, 73 S. Ct. 397, 97 L.Ed. 469 (1953). *Reid v. Jones,* 187 U.S. 153, 154, 23 S. Ct. 89, 90, 47 L.Ed. 116 (1902); *Alcorn v. Smith,* 724 F.2d at 40; *Williams v. Perini,* 557 F.2d 1221 (6th Cir. 1977). It is not necessary that the highest court in the state *accept* petitioner's offer or presentation. In the present action, Johnson presented his claims to the Supreme Court of Tennessee. That Court declined to hear the case. The Tennessee Supreme Court's refusal to hear the case does not alter the fact that Johnson gave "the state courts the first opportunity to correct a constitutional error." *Rose v. Lundy,* 455 U.S. at 514. Therefore, the Court finds Johnson has completely exhausted all state remedies available to him as required in *Rose.*

The central issue before the Court is whether trial counsel representing Johnson was negligent in not investigating and discovering Johnson's past mental illness and

whether that negligence deprived Johnson of a substantial defense that may have, if properly advanced, changed the outcome of the trial. *Strickland v. Washington*, — U.S. —, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). The Court rules counsel's negligence deprived Johnson of a substantial defense.

The test utilized in this circuit is that a criminally accused defendant must receive assistance of counsel reasonably likely to render reasonable effective assistance. It is a violation of this standard for defense counsel to deprive a criminal defendant of a substantial defense by his own ineffectiveness or incompetence. Defense counsel must investigate all apparently substantial defenses available to the defendant and must assert them in a proper and timely manner. *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974). "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 104 S. Ct. at 2068. The record in this case contains facts, which considered in correlation with Johnson's alleged mental incapacity, is "sufficient to undermine confidence in the outcome" of the trial. *Id.*

I.

Johnson Was Adjudicated Non Compos Mentis By the Probate Court of Shelby County, Tennessee, in July, 1976

On July 26, 1976, Johnson's mother, Dorothy Birdsong Pollard, petitioned the Shelby County Probate Court, Division I, to have petitioner involuntarily committed to the Tennessee Psychiatric Hospital in Memphis, Tennessee.

The petition was granted on July 29, 1976, by the Honorable David Ballon of the Probate Court.[4] Johnson remained hospitalized until August 6, 1976. The petition for commitment contained this reference from Johnson's medical records:

> Patient unable to communicate with family, stares in space, acts like a robot, patient was under treatment at the WHMHC, but was not progressing, family was unaware of patient's whereabouts until Sun. 7-25-76.[5]

II.

Johnson Was Held to Be Incompetent To Stand Trial On Criminal Charges Pending Against Him In The Criminal Court of Shelby County, Tennessee, In November, 1976

Counsel for Johnson notified the trial court on November 22, 1976, that Johnson had been adjudicated incompetent to stand trial on the pending criminal charges in the Shelby County Criminal Court, Division V. At the hearing on his habeas corpus petition, James Hough, Attorney, testified:

Q. What is your occupation?

A. I'm a lawyer.

Q. Are you admitted to the bar of this state?

A. Yes, sir.

Q. Are you associated with any firm?

A. I'm with the Shelby County Public Defender's office.

---

[4] *In Re William Lynn Johnson,* (Probate Court of Shelby County, Tennessee, No. 16784-L.D., July 29, 1976).

[5] The hospital records, trial transcript and the entire record in the state proceedings were entered into the record in this proceeding by order of this Court granting respondent's motion to expand the record on January 6, 1986.

Q. Does that firm specialize in any particular area of law?

A. Criminal law.

Q. What year were you admitted to the bar?

A. 1971.

Q. How long have you been associated with the public defender's office?

A. Since 1972.

Q. Do you specialize in any particular area of law?

A. Criminal law.

Q. Do you have or do you know William Lynn Johnson?

A. Yes, I do.

Q. Have you ever represented Mr. Johnson?

A. Represented Mr. Johnson in 1976.

Q. Do you recall when the trial occurred?

A. Well, it wasn't a trial. Maybe I can just give you a brief rundown of what happened with Mr. Johnson. We were appointed to represent Mr. Johnson on September 27, 1976, and at that time—

A. At that time it was noticed by Mr. Jim Rainey of our office at that time that he was unable to communicate with Mr. Johnson. This information was relayed to me and an order was entered on that day to have a doctor's examination for his competency entered.

As a result of that, the doctors entered their certificates, which were dated on October the 18th, 1976, by Dr. Lewis, L-e-w-i-s, Wells. He found the defendant incompetent to stand trial.

On the 27th day of October 1976, a certificate was entered by Dr. Gene, G-e-n-e, Abel, A-b-e-l, who also found that the defendant was not competent to stand trial.

As a result of the certificates entered and my conversations with the defendant and with his mother, Mrs. Pollard, I had a conference with the general, District Attorney General Hugh W. Stanton, Jr. on November the 23rd, 1976, wherein he agreed to nol-pros the cases against Mr. Johnson.

There were five indictments, one indictment was for larceny, one for assault and battery, one for unlawful possession of a sawed-off shotgun, one for unlawful possession of a controlled substance simple, one for unlawful possession of controlled substance with intent to sell.

These indictments, except for the larceny, arose out of the incident wherein he was beaten by the police department which resulted in his incompetence. And on November the 30th, 1976, the nol-pros on these matters was entered in Division V of the Criminal Court in Shelby County.

There was an order entered to the effect in the Criminal Court Division V of Shelby County on November the 30th finding him incompetent to stand trial indicating that Dr. Wells, who had testified on November the 19th, found his incompetency due to organic brain damage being the result of blows to his head that he had received.

That covers my representation of Mr. Johnson.

BY MR. JOHNSON:

Q. It has been brought to the court's attention on around May the 2nd, 1979, you gave the Attorney General, Mike Hughes or James Garts some court's orders on Mr. Johnson's mental condition, mental condition. The use of the insanity defense

and order of dismissal of the case in Division V Shelby County Criminal Court. Could you tell the court briefly what occurred during that—

A. Wait, let me, that was 1979, so I am reaching back in my recollection, but basically I remember walking past Division I of Criminal Court over there, Judge Weinman was sitting, and Mike Hughes or James Garts, G-A-R-T-S, was the I prosecutor. I remember talking to Mike Hughes and asked him basically what was being tried. And he told me it was a murder case and he mentioned your name. And I was amazed that you would be on trial for murder since you had been declared incompetent three years earlier. And I asked him if there had been an evaluation made on you. And he said not to his knowledge. And at that time it was my understanding that I got the information, apparently from the clerk's office, to show him what had been been done in '76 as to your evaluation. And then they apparently had you evaluated sometime in mid-trial, I'm not familiar with the exact details, and it was just until I mentioned that you had been declared incompetent before, the state wasn't aware of this.

Q. During your investigation to Mr. Johnson's phychological treatment during 1975, during 1976, did you discover he had any serious amount of brain damage.

A. Well, I can't recall the exact conversations, the doctors testified to my recollection to my notes, it is in the court order that the doctor testified that you suffer from organic brain damage. I do not remember the exact testimony of the doctor, but it was entered in the order that that is what the problem was.

Q. So the attorney was made aware that it was—I did have—

A. It was organic damages.

Q. Yes.

A. Yes, that's in the November 1976 court order states that there was organic damage. There were some records furnished to me about your stays in John Gaston, but I could not find them when I went to pull this file. I don't know if somebody borrowed them for a hearing that you had over there or they were furnished to me and taken back, I don't know, but I do remember seeing some records of your City of Memphis Hospital admissions because of your rather bizarre behavior out there, I remember it specifically.

Q. Okay. Did Mr. Privett ask you to testify in the case?

A. No, sir, I wasn't asked to testify by anybody.

Q. Did Mr. Privett request your assistance to contact any of the doctors who would have aided in the defense of insanity?

A. To my recollection since 1979, and this is the first I've heard of it since them, but I do not recall talking to Mr. Privett at all. I talked to the prosecutor, Mr. Mike Hughes.

Q. And those, in those cases in Division V, do you know who was the prosecutor?

A. John Pierotti was the prosecutor when they were nol-prossed.

In those proceedings, Judge John P. Colton, Sr., issued an "Order Declaring Defendant Incompetent to Stand Trial." The order reads in pertinent part:

> . . . [I]t appearing to the satisfaction of the Court that petitioner was examined by Doctors Lewis Wells and Gene Abel, said doctors being licensed physicians, who executed certificate certifying in their opinion that the petitioner is not mentally competent to stand trial and in the opinion of Dr. Wells who testified that the de-

> fendant suffers from organic brain damage and in his opinion will not be able to ever be competent to stand trial and that treatment would not improve his condition . . .[6]

III.

The Petitioner was Unable to Continue The Trial, Due To His Mental State, Until Medication Could Be Administered

During the second day of trial, and after the issue of petitioner's mental competency had been raised, Johnson became agitated and ill. It was necessary for the trial to be delayed until a physician examined Johnson and medication administered to him. This occurrence was later related to the jury when the trial judge said:

> Ladies and gentlemen, I wanted to give you a brief explanation of why we haven't gotten back to you a lot earlier. Things often happen like I talked to you about this morning, something unexpected might happen. Mr. Johnson was not feeling well. We had to get some medication, had to get a doctor over here and it just took some time and Mr. Johnson now feels much better and ready to proceed with the trial.

State of Tennessee v. William Lynn Johnson, Trial Transcript Vol. II, p. 126, May 2, 1979.

The Court concludes, from the facts in this record, that Johnson has shown there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Johnson has shown that his trial counsel's failure to investigate his background to determine if he had a substantial defense of

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[6]*Tennessee v. Johnson*, Nos. 54378, 54613, 54614, 54615, 54616, (Criminal Court of Shelby County, Tennessee, November 22, 1976).

mental incompetency, and properly and timely assert that defense, was sufficient to undermine confidence in the outcome of the trial. The Honorable Trial Court apparently thought Johnson and his family should have called Johnson's mental illness to the attention of counsel. While that may be, this omission is not sufficient to overcome trial counsel's duty to thoroughly investigate his client's background for purposes of effectively providing reasonably adequate legal assistance.

While the Court is directing the State of Tennessee to grant Johnson a new trial within 180 days from the date of this order, the Court is not unaware that Johnson, based upon the record showing his brain damage, may well be a danger to society. However, here, we are dealing with the integrity of the judicial process and public confidence in the outcome of that process.

Therefore, after careful consideration, a review of the complete record and for the reasons herein stated, it is ORDERED that the State of Tennessee grant the defendant, William Lynn Johnson, a new trial within 180 days from the date of this order. If a new trial is not granted within 180 days, the Court will issue the Writ of Habeas Corpus as requested by petitioner.

ENTERED this 13 day of June, 1986.

/s/ Ordell Horton
JUDGE
UNITED STATES DISTRICT
COURT

APPENDIX D

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE AT JACKSON

FEBRUARY 1980

STATE OF TENNESSEE	)	No. 41
	)	SHELBY COUNTY
Appellee	)	Honorable Bernie
	)	Weinman, Judge
v.	)	(Carrying a Pistol,
	)	Murder in the Second
WILLIAM LYNN JOHNSON	)	Degree, Using a Fire-
	)	arm in the Commis-
Appellant	)	sion of the Murder in
	)	the Second Degree

FOR THE APPELLEE:

William M. Leech, Jr.
Attorney General
450 James Robertson Parkway
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Robert A. Grunow
Assistant Attorney General
450 James Robertson Parkway
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James Garts
Michael W. Hughes
Assitant District Attorneys
General
157 Poplar Avenue
Memphis, Tennessee

FOR THE APPELLANT:

Charles E. Baucum
Assistant Public Defender
147 Jefferson
Memphis, Tennessee

OPINION FILED: MAY 15, 1980

AFFIRMED

Allen R. Cornelius, Jr.
Judge

OPINION

A Shelby County jury found William Lynn Johnson guilty of carrying a pistol, fixing punishment at a fine of $1,000.00; murder in the second degree, fixing punishment at life imprisonment; and using a firearm in the commission of the murder in the second degree, enhancing his punishment by five years. Johnson appeals, presenting four issues for review.

The evidence accredited by the jury's verdict shows that Johnson had been looking for the victim, Charles (Zack) Moss, over a period of time to collect some money from him. On September 10, 1978, at about 3:30 a.m., Denise Williams and Moss were sitting in Moss's parked automobile outside her apartment when Johnson drove up next to Moss's automobile, got out; and walked over to the passenger side of Moss's automobile. He asked Moss about the money and Moss said he didn't have it. Johnson then pulled out a pistol, shot Moss four times, and then drove off quickly in his automobile.

Gregory Summers, Denise Williams' nephew, testified that he came home about 3:00 a.m. on September 9, 1978, and was locked out of his grandmother's apartment at 93 West Fairway. After getting a key from his aunt who was sitting in a car parked outside, he went to open the apartment door and heard four gunshots. He ran back to Moss's automobile where his aunt was screaming and he saw another car leave in a hurry. He did not see a weapon inside the car or at the scene.

Moss's mother and William Ford testified that Johnson had been looking for Moss on Saturday, September 9th, or just after midnight on September 10th. Ford testified

that Johnson said, "Well, you tell him I want to see him about my $200.00. You tell him, I want to know something about it tonight."

Sergeant H. W. Carpenter testified that he interviewed Johnson after Johnson surrendered himself to the police. He advised Johnson of his rights after which Johnson gave a statement admitting that he killed Moss. At a jury-out hearing Johnson was questioned about whether he "freely and voluntarily" gave the statement to police. The Court ruled Johnson's statement admissible. Johnson had said in his statement that he shot Moss after it appeared to him that Moss was "trying to sneak or do something. However, the police officer investigating the crime testified that no weapon was found on Moss or in his car.

In his first issue presented for review Johnson asserts that the Trial Court should have granted his motion for judgment of acquittal as to murder in the first degree. His motion was denied and Johnson failed to raise the issue in his motion for a new trial, therefore, he cannot raise this issue on appeal. Tenn. R. App. P., Rule 3(e).

Under the proof offered by the State, a jury could have found Johnson guilty of first degree murder. Johnson had been looking for Moss and found him sitting in a car. He exchanged words with Moss and then shot him four times. There was no evidence that Moss was armed. Since the proof was sufficient to warrant a conviction, the Trial Court did not abuse its discretion in overruling the motion for judgment of acquittal. *State v. Cabbage,* 571 S.W.2d 832, 836. Rule 29(a), Tenn. R. Crim. P.

In his second issue Johnson alleges that the Trial Court should have allowed the defense to fully develop his

mental condition in the jury's presence. At the beginning of the second day of the State's proof, Johnson's attorney advised the Court that he had just become aware that Johnson's mental condition could be an issue and he requested that Johnson be examined by a State psychologist. The Court agreed to the examination and signed an order for it. At the end of the defense's proof, Johnson's counsel requested that he be allowed to introduce evidence of Johnson's mental condition. An offer of proof was made of Johnson's hospital records from the Memphis Mental Health Center. These records included a judgment of the Shelby County Probate Court on July 29, 1976, finding William Lynn Johnson to be "mentally ill" and committing him to the Tennessee Psychiatric and Research Hospital. These records also show that Johnson was admitted to the Tennessee Psychiatric Hospital on July 29, 1976, and was discharged in "improved condition" on August 6, 1976. Although the records indicate that the prognosis for Johnson was "very poor," the staff psychiatrist's report indicated "discharge competent." There are no records showing any further treatment of Johnson. The Trial Court denied the request to present proof as to Johnson's mental condition, citing Rule 12.2, Tenn. R. Crim. P. The State had no notice that Johnson would attempt to introduce evidence of an insanity defense and therefore did not request a psychiatric examination of Johnson, or voir dire the jury as to the issue of insanity, or obtain expert testimony regarding insanity. The issue of Johnson's mental condition was not properly brought before the Trial Court, therefore, under Rule 12.2, it was not error for the Court to refuse to allow evidence of Johnson's mental condition. This issue has no merit in this proceeding.

Johnson alleges in his third issue that the State withheld exculpatory evidence in failing to present an eyewitness to the occurrence, William Collins, III, and that he was therefore denied a fair and impartial trial as guaranteed by the U.S. Constitution. This issue was not raised in Johnson's motion for a new trial and therefore, cannot be raised for the first time on appeal. Tenn. R. App. P., Rule 3(e). The issue is also otherwise without merit. There is no indication in the record that the State withheld, or suppressed, exculpatory evidence. Collins was called as a witness for the defense and he testified for Johnson, so his testimony was not withheld from the jury. The State was not required to call Collins as a witness even though he was an eyewitness to the crime. *State v. Bomar,* 381 S.W. 2d 287, 288; *Eason v. State,* 65 Tenn. 431, 436.

In his fourth issue Johnson contends that it was error for the Trial Court to allow the State to ask a witness, William Collins, III, about a previous criminal conviction of his which was pending in an appellate court. Johnson failed to raise this issue in his motion for a new trial and he has, therefore, waived it on appeal. Tenn. R. App. P., Rule 3(e). *Pennington v. State,* 573 S.W.2d 755, 758. However, there was no abuse of discretion by the Trial Court in allowing the State to attack Collins' credibility by asking him about a previous criminal conviction even though an appeal was pending. *McCoy v. State,* 466 S.W.2d 540.

All issues are without merit and the judgment of the Trial Court is affirmed.

/s/ Allen R. Cornelius, Jr., Judge

CONCUR:

/s/ Robert K. Dwyer, Judge

/s/ Martha Craig Daughtrey, Judge

APPENDIX E

IN THE SUPREME COURT OF TENNESSEE
AT
JACKSON

[Filed July 28, 1980]

WILLIAM LYNN JOHNSON	)	
APPLICANT	)	SHELBY CRIMINAL
v.	)	C.C.A. NO. 41
STATE OF TENNESSEE	)	
RESPONDENT	)	

ORDER

Upon consideration of the application for permission to appeal and the answer thereto, the briefs of counsel and the entire record, the Court is of the opinion that the application should be denied, with concurrence in the result only.

PER CURIAM

APPENDIX F

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE
AT JACKSON

JUNE 1983

STATE OF TENNESSEE,	)	No. 74
	)	SHELBY
Appellee	)	CRIMINAL
	)	No. P2311
v.	)	
	)	The Honorable
WILLIAM LYNN JOHNSON,	)	Bernie Weinman
	)	Judge
Appellant	)	(Post-conviction)

For the Appellee:

JENNIFER HELTON SMALL
Assistant Attorney General
Nashville, Tennessee
P. THOMAS HOOVER
Assistant District Attorney General
Memphis, Tennessee

For the Appellant:

MAURICE E. FRANKLIN
Memphis, Tennessee

Opinion Filed: Dec. 29 1983

AFFIRMED

RICHARD R. FORD
Special Judge

OPINION

The appellant-defendant was convicted of second degree murder, committing a felony by use of a firearm, and of carrying a pistol with the intent to go armed. He received respective sentences of life imprisonment, an enhancement sentence of five (5) years, and a fine of one

thousand ($1000) dollars. On the appeal of his conviction the judgments were affirmed in an opinion of this Court. *See State v. Johnson,* Shelby, C.C.A. 41, Jackson, May 15, 1980. Permission to appeal was denied by the Supreme Court on July 28, 1980. Thereafter the defendant filed a petition for post-conviction relief which was dismissed after an evidentiary hearing. We affirm the judgment of dismissal.

For the post-conviction case attorney Maurice E. Franklin was appointed by the court, and following the evidentiary hearing, attorney Thomas Veteto was appointed to represent the defendant for his appeal. On April 12, 1983, this Court, pursuant to Rules 2 and 21(b), Tennessee Rules of Appellate Procedure, entered an order suspending Rules 5 and 24, Tennessee Rules of Appellate Procedure, and allowing the defendant additional time within which to file a transcript of the evidentiary hearing, and within which to prepare and file briefs. Ignoring his appointed counsel the defendant filed a profusion of pro se amendments and supplemental verbage of which he appeared to have little or no understanding. For the post-conviction hearing his attorney, Maurice E. Franklin, correctly recognized and presented a single issue to the trial court. On appeal the issue for our determination is whether the trial court erred in finding that there was no merit to the alleged ground of ineffective counsel by reason of his alleged failure to timely raise the defense of insanity.

During the evidentiary hearing the defendant testified that his trial attorney was retained three (3) or four (4) months before the jury trial; that no one in the defendant's family told his retained trial attorney of the defendant's earlier treatment for mental illness; that he, the defendant,

had no remembrance of the trial; that he was insane at the time of the offenses, and that he did not recall the offenses, nor recall his giving of a written statement of admission on November 26, 1975. He did recall that his retained counsel never talked with him about his case.

During the evidentiary hearing evidence was presented by other witnesses that upon his being ordered into custody on the day of his jury trial the defendant created a scene in the courtroom by jumping up and down, screaming and crying. On the second day of trial, in a chance meeting with a former attorney of the defendant, defense counsel first learned of the defendant's earlier history of treatment for mental illness. On the prompt motion of defense counsel the trial was recessed and the defendant was given a psychiatric examination. The defendant was found to be mentally competent and the trial was resumed.

Michael W. Hughes, assistant district attorney testified as to his pre-trial conversations with defense counsel which included references to the factual evidence, witnesses plea bargaining, and the defendant's record of three (3) previous felony arrests which made no mention of any prior mental problems. He further stated that prior to the defendant's outburst he appeared to be normal in his demeanor. He testified that defense counsel did a thorough investigation and "did a very good job in this case."

The trial court's findings included, inter alia, that the attorney for the defendant had adequately prepared his case for trial; that he had been in contact with the State to get a guilty plea offer; that he received a complete discovery response from the State; that upon being made aware of the appellant's previous mental illness, he brought it

to the attention of the court and obtained a mental examination of the appellant before resuming trial; that he properly cross-examined the State's witnesses and presented the appellant's proof. From the foregoing findings the trial court concluded that defense counsel's services "were within the range of competency demanded of an attorney in criminal cases, as set out in *Baxter v. Rose,* 523 S.W.2d 930 (Tenn. 1975).

The findings of the trial court on questions of fact are entitled to the weight of a jury verdict. *Taylor v. State,* 180 Tenn. 62, 171 S.W.2d 403 (1943); *Janow v. State,* 4 Tenn.Cr.App. 195, 470 S.W.2d 19 (1971). The findings of the trial court on questions of fact are conclusive unless this Court should find that the evidence preponderates against the trial court's judgment. *State v. Martin,* 627 S.W.2d 139 (Tenn.Cr.App. 1981); *Clenny v. State,* 576 S.W.2d 12, 14 (Tenn.Cr.App. 1978). We have determined that the evidence adduced in the post-conviction hearing does not preponderante against the judgment of the trial court.

The judgment is affirmed.

/s/ Richard R. Ford
Special Judge

CONCUR

/s/ John K. Byers
Judge

/s/ Allen R. Cornelius, Jr.
Judge

APPENDIX G

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

[Filed March 5, 1984]

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	
	)	SHELBY
v. C.C.A. No. 74	)	CRIMINAL
	)	
WILLIAM LYNN JOHNSON,	)	
	)	
Appellant.	)	

ORDER

Upon consideration of the application for permission to appeal and the entire record in this cause, the Court is of the opinion that the application should be denied.

PER CURIAM